PROCEDURAL REFORM.

IN legal fetters, bound upon us largely by our own consent, the profession struggles, afraid to free itself, partly because of the word *reform* with its accepted implications.

To my own mind everybody is a reformer. In the nature of things we are all taking part in re-forming conditions—for the better or for the worse. It was BACON who said, "Since things spontaneously change for the worse, unless by design they are changed for the better, evils must multiply without end." Every person, therefore, who stolidly refuses to take part in any reform movement whatsoever is himself a reformer, taking part by inaction in the spontaneous change for the worse.

It is interesting to note that BACON'S first speech in Parliament of any moment was upon the subject of law reform, and the purpose he carried with him to the end of his life. He had in mind the codification of the laws and decisions of his country, but a part of his plan was procedural reform. This is evident from his expressed hope that one result of his work would be to see "the contentious suitor that seeketh but vexation disarmed, and the honest suitor that seeketh but to obtain his right relieved."

It cannot be claimed that we have kept in touch with the progress of the times in this matter of procedural reform. In Illinois, which is a fair illustration, for instance, we are yet under the old English system, partly entombed in our statutes. Ignoring appellate procedure, and taking the practice-act as a sample of general conditions, and not going farther back than 1845, we find that twenty-two sections are either the same as they were in 1845, or have been so slightly changed as to be to all intents and purposes the same. From that date until the revision of the act, in 1872, a stretch of 27 years, practically but 8 changes were made. None of these changes was much more than verbal and, all told, they did not materially affect the general system of procedure.

The revision of 1872 was not startling; it did not produce any real or substantial changes in the operation of our court machinery, and conditions so continued until 1907. During this latter period of 35 years only 19 changes were made in lower court procedure, and during 22 years of this time, that is to say, from 1889 to 1911, only one.

The revision of 1907 was the result of recommendations made by the Illinois Practice Commission, the appointment of which, after

five years of agitation, was authorized by the General Assembly in 1899. That Commission traveled about the state and spent over 50 days in listening to the suggestions of misguided lawyers who fancied that our system was not perfect and might perhaps be altered in minor details. The Commission considered nearly 500 suggested amendments of the law, recommending about 150. Of this number, 18 in the form of new sections were enacted. Sections to the number of 70 were left without any change whatever. While the last state may be said to be better than the first, and while the public convenience has been somewhat advanced, these changes related largely to special matters, and, again, did not materially affect the general system under which justice has been administered in Illinois.

Since 1907 only 4 modifications of lower court procedure have been enacted, all in the same year.

On the basis of logic, merely, it is not easy to comprehend why we should adhere to the practice inherited from England, for we are all aware that the Mother Country has long since discarded that very practice. The logic, as well as the common sense of the situation, is not at fault; it is, rather, the very natural conservatism of the profession in keeping close to precedent, a fault which we drink in with our law studies, and continue to absorb in our daily experience in and out of court. We should add the inability to convince the General Assembly—partly because of disagreements among ourselves, partly because the lay members of the Assembly have to take the reform on faith, but largely because that body always has matters before it which are the special concern of the several members, representing as they do particular constituencies, with particular wants, whereas the matter of law reform is everybody's business and is, of course, nobody's business.

Be that as it may, the fact remains that we cannot claim to have done our duty as a profession by the profession or by the public. It is the right of the public to demand, and it does demand, that the administration of the law in our lower courts shall be freed from the hurdles of a by-gone age—that justice in the words of the Constitution of Illinois, shall be *"without delay."* We have delay here in Cook County, at least, where a case at law begun in one of our courts today would not be reached for a year to a year and a half; and if begun in the other court, not earlier than a year and a half to two years. The situation shifts with the changing conditions. When one court is behind, suitors seek the other; and both courts vary with conditions in the Municipal Court of Chicago.

This question has been considered merely from the standpoint of our practice-act, but the conclusions fairly exemplify conditions in Illinois. And conditions here are practically duplicated in other states. On the other hand, in 1912 the profession roused itself from its sleep long enough to change the Federal practice and abolish an entire court, or chain of courts, and to rid itself of a lot of duplicate machinery. And the Chancery rules were actually revised later in the same year.

If one were to venture a statement of the basic reason for such lack of progress it would be this, that all the professions are too scientific—too far removed from the practical requirements of the times. Lawyers can perceive this fault in others. The scientist puts on paper opinions in such grotesque vocabulary that we suspect the substance. We can, too, fairly criticize the men of the cloth as too much wedded to dogmatism, which, by the way, Douglas Jerrold defines as "puppyism grown to maturity."

We have been wont to say, also, that the medical profession has been less interested in saving life than in making sure that the patient dies "regular." But that profession has to a great extent shaken off its fetters. Note what has been accomplished during the period which we have been considering.

General anaesthesia dates back no farther than 1845. This discovery not only saved life and limb but it marked an epoch in medicine. It has probably benefitted and comforted more millions of sufferers than any other single blessing. By means of it operative surgery was robbed of its terrors, and by its exploitation attention was challenged, procrastination was roused to activity, and intensive cultivation was applied to this field with the result that the details were so modified and improved that this boon to mankind has been rendered both sure and safe. From the general anaesthetic sleep produced by chloroform, ether, and nitrous oxide, to the local anaesthesia produced by cocaine, by freezing, and by other methods, has been a gradual but a short journey.

Since 1872 the germ theory of disease has not only been put forth but its basis has been proved. No discovery in medicine during ancient or modern times is comparable to this. The distinctive germ has been found and we have now advanced to the point in practically all infectious diseases where the means of prevention are available, or soon will be, and to a degree a cure has been evolved. Even now in these maladies the sum of illnesss, suffering, invalidism, economic waste, and death have been decreased to a marvelous degree.

Child-bed fever, which once threatened every puerperal couch, has disappeared, and the danger of childbirth has been so much lessened

that in one charitable organization in Chicago, whose field is obstetrical cases scientifically cared for by medical men, the death rate is only one in a thousand.

Diphtheria, which long after 1872 terrorized whole communities, has been transferred to the retail department and is no longer feared.

Typhoid fever has not only ceased to be the terrible menace that it once was but modern medicine is now able to render us practically immune; the Chicago death-rate from this disease per 100,000 of population has been decreased from 173 in 1891 to 8 in 1912; and the army of the United States with its 50,000 soldiers has been able to exterminate the disease altogether.

Malaria and yellow fever are now readily preventable. New Orleans prior to 1880 never escaped an epidemic of yellow fever, except, parenthetically, when it was governed by a lawyer, General Butler. Since 1880 it has not had a single epidemic worthy of any mention. The world has witnessed in recent years, also, the changing of Havana from a plague spot to a winter resort; the renovation of pest-ridden Manila, and its transformation into a city of normal death rate; and health conditions reversed at Panama, making possible the greatest engineering accomplishment of all time.

Since 1872 the modern hospital and "the lady with the lamp" have become an important aid to medicine and surgery, saving thousands upon thousands of lives, while the X-ray and a score of other modern medical triumphs readily occur to our minds.

All these wonders have been accomplished by our sister profession during this period when we have been playing the part of Rip Van Winkle. We have been too scientific. We have been too much given over to metaphysics. The whole system of common law pleading has been put on the defensive, and some now even dare to doubt the value of technical pleadings of any kind. We are coming to realize that time spent spent in this department is a useless burden to courts and lawyers, and the materialists among us are now arguing that a lawsuit will stand only about so much of a charge, and that all the labor of pleading is so much financial loss. Most defendants have never done more than plead *not guilty*. Such has been the rule in criminal cases and in the great volume of common law suits brought to recover for personal injuries. Moreover, cases before justices of the peace have been conducted practically without pleadings from the beginning. They are an important class of cases, too, judged by the only proper standard, the extent to which they really affect the litigants. With the same informality, also, the Probate Courts satisfactorily dispose of the claims against estates, sometimes

involving large fortunes. An eloquent instance is to be found in the Probate Court of Cook County, which in round numbers disposes of 10,000 claims a year, 1,000 of them contested, with less than 25 appeals.

The Municipal Court of Chicago handles over 40,000 civil cases annually without technical pleadings; more than 90% of them involving over $1,000. The lack of formal pleadings has not resulted in embarrassment, and the efficiency of the court has been much increased by the absence of the machinery of pleading. On the other hand, one of our lawyers in general practice recently spent three days delving into the mysteries of *absque hoc,* not to make any affirmative use of the information, but merely to be sure that he would not be caught in a trap. This is but an illustration of our over-scientific procedure. Let any lawyer look over his docket and consider how much time he has spent in determining in what court and in what manner to bring his case, and how much he has spent in maintaining his position; he will readily perceive that no small portion of the aggregate time invested in litigation is taken up with this waste effort.

We are slow to draw the proper deductions from these facts. But the impulse which elsewhere has given so much prominence to the word *efficiency* is now felt in the law. The advance sentiment is rapidly forming. And while we are preparing to adopt radical changes looking toward simplicity and directness a new principle, suggested by the English Judicature Act, seems destined to blaze the trail, the taking away from the legislatures the power to fix our procedure, and lodging the same in the courts of last resort, to be there determined by rules adopted from time to time. Such rules will represent the enlightened judgment of the profession. They will be framed intelligently and passed deliberately. They will have the solid basis of technical precision, and at the same time, and above everything else, they can be promptly changed with the shifting needs of the times by those in the best position to understand these needs. When this change has been made we will be in condition to take advantage of the sentiment which will then have more fully ripened, and will not again in lower court procedure have a period of 22 years with but one change, nor a period of 27 years with but 8 changes. Then legal procedure can readily respond to the true demands, and we can hold up our heads among the occupations of mankind and claim to be an efficient, as well as a learned, profession.

Chicago. ROBERT MCMURDY.